85-1496

Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

PEARL ALPERSTEIN, ALICE AMOTO, PAUL BABISH, PHYLLIS BABISH, BRENDA BAUMANN, BRUCE BAUMANN, MARCY BISHOP, JIM BISHOP, ROBIN BLAKEY, VERNON BLAIR, BEVERLY BLAIR, PATRICIA BOLAND, WILLIAM BOLAND, ROBERT BOLLINGER, IRMA BOLLINGER, ERNEST BOND, ELINOR BOND, EUGENE BRACE, FRANCES BRACE, RICHARD BRUCE, GLORIA BRUCE, CHARLES BURKHARDT, PATRICIA BURKHARDT, JOE CAMPANELLA, IVA CAMPANELLA, WILLIAM CHAPMAN, THERESA CHAPMAN, DEWITT CLARY, LETTIE CLARY, SAM COYLA, BETH COYLA, BILL CRAIG, ERLENE CRAIG, CLAYTON CUNNING, LEONORE CUNNING, ROBERT DALY, GERALD DEITZ, DONNA DEITZ, ELIZABETH DELAMARTER, JOHN DILLIE, MARY DILLIE, MATTIA ECKHOFF, ROBERT EGGART, IVAN EWING, MURREL EWING, ELIO FERDANI, JOSEPH C. FELLOWS, MRS. EMILY FERGUSON, RALPH FOX, RUBY FOX, EDWARD FRAUSE, EDNA FRAUSE, LEOLAN FRY, CLARA FRY, DUANE GRAUL, SCOTT GRIDLEY, ARTHUR GUPTON, DELLA GUPTON, MARION HILDEBRANDT, HARVEY HINDS, BETTY HINDS, MARY LOU HINDS, JIM HINDS, HAROLD HOUSTON, MERWIN HUMPHREY, ANN HUMPHREY, E. CARTER HUTCHINSON, LORRAINE HUTCHINSON, ANN JONES, JOHN KENEHAN, DOROTHY KENEHAN, GAIL KINCADE, DOROTHY KINCADE, WILLIAM KLINE, KELVIN KREYMBORG, KEVIN KREYMBORG, THOMAS KURFESS, LYNN KURFESS, WILLIAM LAMBERT, ROBERT LOWENBERG, CHERIE LOWENBERG, VICTOR LUTHER, PEGGY MacGILL, WILLIAM MacGILL, JOHN MATTHEWS, JOAN MATTHEWS, RACHEL McQUERREY, ERNEST MUBERLY, JAMES MOORE, FRED MUNIZ, FRED M. MUNIZ, JR., RONALD B. MUNIZ, DOROTHY PARRY, BARBARA PAULS, CHARLES PAULS, STEPHEN PAYNE, ARTHUR PEARSON, VIRGINIA PEISTER, JACOB ALFRED PEISTER, ARTHUR

PETERSON, JANET PETERSON, RICHARD PERKINS, CAROLE A. PERKINS, LYLE PICRAUX, BETTY PICRAUX, DOUGLAS POPE, MARGARET POPE, LOREN SEAGO, FRANCES SEAGO, ROGER SEICK, BERNADETTE SEICK, GARNETT SISCO, JOE SMITH, BENTON SHAINE, HUBERT SNYDER, SHIRLEY SNYDER, HARRY STEINKE, MARY STEINKE, SUSAN STEINKE, ARZA D. STRAIGHT, ROBERT TRAVIS, MARGARET TRAVIS, THOMAS TRAVIS, DALE UNRUH, MYLO UNRUH, ALBERT J. VOGEL, BILL WAGNER, ILENE WAGNER, DURRETT WAGNER, BETTY JANE WAGNER, DENNIS WEDDINGFELD, ALAN WENTWORTH, MARGARET R. WILBUR, JOHN WILSON, ALAN WILSON, CLIFF PARKER, EDWARD WYMAN, VIRGINIA WYMAN, WILLIAM J. KIRKPATRICK, LOUISE M. KIRKPATRICK, GEORGE R. KIRKPATRICK, ARLYN KIRKPATRICK, ERIC ANDERSON, CHRISTINE ANDERSON, KERSTIN M. SHANE, LOYAL E. ALTMAN, GOLDA M. ALTMAN, MICHAEL L. HORVAT, MURRAY B. CHIDESTER, JEAN S. CHIDESTER, JAMES E. McNEAL, EDWIN C. HINES, DeANN HINES, ARTHUR BAUER, ESTHER BAUER, SHIRLEY GODDARD, WINIFRED E. GRENFELL, LEO R. WADSACK, ALTA L. WADSACK, CHARLES MULLENHOUR, GENE W. SCHNEIDER, FREDERICK M. BARTELDES, ROBERT BROWN, and VENETTA BROWN,

Petitioners,

vs.

THREE LAKES WATER AND SANITATION DISTRICT,

Respondent.

ON WRIT OF CERTIORARI

TO THE COLORADO COURT OF APEALS

PETITION FOR A WRIT OF CERTIORARI

John M. Cogswell
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Telephone: (303) 861-2150

ATTORNEY FOR THE
PETITIONERS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners pray that a writ of certiorari issue to review a decision of the Grand County District Court, State of Colorado, affirmed by the Colorado Court of Appeals, and, in support thereof, show:

QUESTION PRESENTED FOR REVIEW

Does the U.S. Constitution require the respondent Three Lakes Water and Sanitation District (the "District") to provide the petitioners with a procedural due process notice and hearing prior to compelling them to connect their property to the main sewer line where, upon default of connection, the District is authorized to connect the property and have a first and prior lien on the petitioners' property for the cost of connection and where no procedure or opportunity otherwise exists to question the

connection order, the lien or the special assessment tax permitted to enforce the lien?

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OPINIONS BELOW

Neither the decision of the trial court nor the opinion of the Colorado Court of Appeals has been published. Copies are included in Appendix 1 and Appendix 2.

JURISDICTION

The petitioners seek review of an order of the Grand County District Court, State of Colorado, entered in Case No. 83CV99 on March 16, 1984 and affirmed by the Colorado Court of Appeals in Case No. 84CA0512 on August 22, 1985. The Colorado Court of Appeals denied the petitioners' timely Motion for Rehearing on September 19, 1985. The Colorado Supreme Court denied the petitioners' timely Petition for Writ of Certiorari in Case No. 85SC418 on December 16, 1985. The mandate affirming the judgment of the Grand County

District Court case issued by the Colorado Court of Appeals on December 24, 1985.

This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The constitutional provisions, treatises, statutes, ordinances and regulations which this case involves are set forth below either verbatim or by reference to the Appendix.

a. Constitution of the United States, Amendment XIV.

> SECTION 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b. Three Lakes Water and Sanitation District Act.

A copy of pertinent provisions of this Act found at C.R.S. § 32-10-101 et seq. is included in the Appendix as Appendix 3.

c. Colorado Statutes relating to enforcement of District's lien where the District connects a property to its sewer line.

These statutes are C.R.S. §§ 39-1-111, 113 and 39-10-114. A copy of these statutes is included in the Appendix as Appendix 4.

d. Pertinent administrative actions of the District.

A copy of the public notice and the Connection Order are included in the Appendix as Appendix 5.

STATEMENT OF THE CASE

The petitioners own cabins in the Grand Lake, Colorado area. This area is principally a summer recreation area centered about three beautiful lakes. Grand Lake is a small town located on the shores of one lake. Summer cabins are located along Grand Lake and in neighboring mountain areas.

On April 26, 1982, the District, at a public meeting, held after a false notice given by publication in a local newspaper and by posting at the local Courthouse, adopted a resolution finding that all owners of residences and businesses located on property with boundaries within 400 feet of the District's sewer lines were required to connect to the District's sewer system for the protection of public health. The District acted pursuant to the Three Lakes Water and

Sanitation District Act (the "Act"), C.R.S. § 32-10-101 et seq.

The trial court and the Court of Appeals held that the connection statute authorized legislative action, that such legislative action did not require procedural due process, that the state and federal constitutions do not require procedural due process and, in effect, that, if the petitioners are ordered to connect and do not, the petitioners' properties can be sold by tax sale to repay the District if it chooses to connect them itself without the petitioners ever having an opportunity to object or complain.

The District was created in 1971 by the Colorado Legislature specifically for the purpose of addressing the pollution and water quality problems of the Three Lakes area including Grand Lake and Grand Lake, Colorado.

The District, as established by the Colorado Legislature, covers 59.25 square miles, including water surfaces. The District is different from a sewer district in a highly populated metropolitan area. As such, the 400 foot limitation referred to above, in context with the rural nature of the properties of petitioners, has little meaning.

The District, in issuing the connection order, acted pursuant to a statute which stated as follows:

> (4) The district is authorized to compel the owner of any business, dwelling, or other inhabited premises within the district to connect such premises, in accordance with the applicable plumbing code, to the water or sewer line, or to both such lines, if the board finds such connection necessary for the protection of public health, and if the service lines of the district are within four hundred feet of the nearest property line of such premises.
>
> (5) The board shall give notice to compel such connection to

> such owner by registered or certified mail, return receipt requested, to make such connection within twenty days of receipt of such notice, and if such connection is not begun within such period and completed with reasonable diligence by the owner, the board may thereupon make such connection, and the district shall, upon completion, have a first and prior lien on the premises for the cost of such connection. Such lien shall be enforced in accordance with the provisions of section 32-10-121.

C.R.S. § 32-10-117(4), (5) (emphasis added).

In this case, the District published a false notice of "a hearing on compelling the connection of businesses, dwellings and other inhabited premises . . ." scheduled for April 26, 1982. The notice was false because it stated only that the District was authorized to compel the connection if its main service lines were within four hundred feet of the nearest property line of the premises and did not state that the District's

authority was conditioned on its finding that connection was "necessary for the protection of public health." The notice was misleading because it did not say connection orders could result from the hearing and the effect on an owner if such orders were not followed.

The District received a number of letters prior to the public meeting and about forty members of the public attended. Also present at the meeting were the acting Grand County Sanitarian and the District Engineer for the Colorado Department of Health. Both the Sanitarian and the District Engineer recommended that the District require all inhabited premises located on property whose boundary was within four hundred feet of the District's lines to connect to such lines for the protection of public health. After consideration of the statements and documents

presented at the public meeting, the District on April 26, 1982 adopted a resolution finding that all owners, including petitioners, of residences and businesses located on property whose boundaries were within four hundred feet of the District's sewer lines were required to connect their improvements to the District's sewer lines (the "Connection Order"). As required by C.R.S. § 32-10-117(5), the District sent out certified letters dated July 28, 1982 notifying 965 owners (including the petitioners) of the requirement to connect to the District's sewer lines. Appendix 5.

The effect of the foregoing and C.R.S. § 32-10-121 is that the District, through the Board of County Commissioners, can levy a special property tax on any landowner who refuses to connect which shall be "assessed, collected, remitted and accounted for in the

manner provided for other general ad valorem taxes." Significantly, the assessment procedures provide a landowner only the right to protest valuations, not the tax. C.R.S. § 39-5-122. No opportunity to object to the tax is provided by applicable collection procedures (C.R.S. § 39-10-101 et seq.) or by the tax sale procedures (C.R.S. § 39-11-101 et seq.).

The petitioners filed a complaint and amended complaint in the Grand County District Court challenging the Connection Order and raising the federal question sought to be reviewed by this Petition. Petitioners sought both administrative review under Rule 106(a)(4) of the Colorado Rules of Civil Procedure and declaratory judgment that the Connection Order violated their Fourteenth Amendment rights to notice and opportunity for

hearing because the notice given was published (and should have been personally given), because the notice was false and because the notice was insufficient (the action taken was at variance from the expectations it created).

The petitioners contended that the Fourteenth Amendment prohibited the District from compelling them to connect to the District's main sewer line unless the District provided petitioners with individual notice and opportunity to present evidence and unless the District made findings with respect to each petitioner who was compelled to connect that connection was required for the protection of the public health.

The District filed a motion to dismiss both the Rule 106 and declaratory judgment claims. Relying on its decision in earlier consolidated cases concerning the same

issues[1], the trial court granted the District's motion to dismiss stating:

> As to the requirement for notice and hearing on constitutional grounds, the court notes that the police powers of government have been recognized as being one of the least limitable powers and notice and hearing are not required by either state or federal constitution. District of Columbia v. Brooke, 214 U.S. 138, Hutchinson v. City of Valdosta, 227 U.S. 303, and also Millis v. Board of County Commissioners of Larimer County, 626 P.2d 652. As to the necessity for the rule, the court notes the numerous cases cited by Defendant from other jurisdictions.

See Order dated March 16, 1984 of the Grand County District Court, Appendix 1.

The petitioners filed a motion for clarification or, in the alternative, for new

---

[1] The earlier cases were a consolidation of two separate cases containing different plaintiffs who were making the same complaints as the petitioners in this case. The plaintiffs in the earlier cases did not timely file a notice of appeal and the judgment of the trial court was affirmed for that reason by the Colorado Court of Appeals.

trial, which the District Court denied. This motion was predicated on the trial court's disregard of the procedural requirements of Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).

The petitioners appealed the trial court's decision to the Colorado Court of Appeals. The Colorado Court of Appeals affirmed the trial court's decision stating in part:

> We do not view the statutory word "finds" [C.R.S. § 32-10-117(4)] in the context here as requiring a judicial type hearing and personal notice.
>
> Plaintiffs also contend that, if the statute does not require notice and hearing, the due process clauses of the United States and Colorado constitutions prohibit the district from compelling any owner to connect to its sewer lines unless it provides such owner with individual notice and an opportunity for a judicial type hearing. We regard Hutchinson v. City of Valdosta, 227 U.S. 303, 33 S.Ct. 290, 57 L.Ed. 520 (1913), and its progeny, as

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dispositive against plaintiffs on this issue.

In Hutchinson, the Supreme Court reviewed an ordinance passed by the City of Valdosta by which owners of homes abutting on any street along which sewer lines had been laid were required to install toilets in their houses and to connect the same to the public sewer lines within thirty days from the date of passage of ordinance. The court held that this was a valid exercise of the police power and that, although the ordinance afforded no prior personal notice or opportunity to be heard, it did not deny either due process or equal protection.

The Hutchinson court stressed that the connection order was for the welfare of the city inhabitants and that "[i]t is the commonest exercise of the police power of a state or city to provide for a system of sewers and to compel property owners to connect therewith."

The petitioners seek reversal of the trial court's decision because they did not receive a proper individual notice and opportunity for hearing. This case does not raise as an issue whether the connection

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order, if issued in accordance with procedural due process, is constitutional as applied to the petitioners.

REASONS FOR GRANTING WRIT

Colorado courts have decided federal questions in a way in conflict with applicable decisions of this Court.

Armed with a misunderstanding of the police power and the meaning of Hutchinson, the Colorado courts have disregarded and refused to follow the clear mandates of Mullane v. Central Hanover Tr. Co., 339 U.S. 306, (1950), Mennonite Board of Missions, supra, Nebbia v. New York, 291 U.S. 502 (1934) and Londoner v. Denver, 210 U.S. 373 (1908).

The Colorado courts' decision, if allowed to stand, will perpetuate unconstitutional conduct throughout the state in direct

contradiction of prior rulings of this Court. The petitioners should not be penalized because the Court of Appeals neither understands Supreme Court law nor its own prior decisions correctly interpreting Supreme Court cases. Cf. Brown v. City of Denver, 7 Colo. 305, 3 P. 455 (1884).

This Court is required to step in and put the Colorado courts back on course. If it does not, serious constitutional error will perpetuate resulting in the unconstitutional loss of the petitioners' properties.

It is only fair, as an example, that a landowner whose summer cabin, located several miles from the main sewer line on property whose boundary is four hundred feet from the main line, unequipped with running water, and occupied but several weeks a year, have an opportunity to explain to the District why he

should not be compelled to connect. There are examples where connection is clear and will undoubtedly be required. But a blanket connection order without notice and hearing has, in this case, set in motion a course of events which can conclude in the sale of any petitioner's property without any opportunity to show why that connection is neither necessary nor reasonable in the public health. The fact is that connection was ordered by the District to obtain money, not to protect health, and a due process notice and hearing would so establish.

Both the trial court and the Colorado Court of Appeals erred in holding that the connection order was a legislative act such that no due process notice and hearing was required. As this Court noted in Mennonite Board of Missions:

> Prior to an action which will affect an interest in life, liberty or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . .

Mennonite Board of Missions, supra, at 795, citing Mullane v. Central Bank & Trust Co., supra, at 314. The "action" referred to includes judicial or legislative action. As explicitly stated in Nebbia v. New York:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the election of the admitted power, by securing that the end shall be accomplished by methods consistent with due process.

Nebbia, supra, at 525. Where property rights are affected, due process requirements do not depend upon whether the proceeding is

characterized as judicial or legislative as the Colorado courts have held. In Londoner v. Denver, 210 U.S. 373 (1908), this Court struck down an assessment ordinance (a legislative act) because the landowners to be charged with the assessment for paving a street ". . . although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them." This Court stated that "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief and, if need be, by proof, however informal." Londoner, 210 U.S. at 385, 386.

If the Court agrees that the petitioners were entitled to due process notice and hearing, then the record is clear that proper notice was not furnished. The notice was

inadequate because it was false, because it did not accurately describe the scope of the hearing and because it did not adequately describe the breadth of the order which the Board of County Commissioners intended to issue. The notice was inadequately given because publication was not sufficient under the circumstances. In Mullane, this Court laid out the fundamentals of due process protection, stating:

> The fundamental requisite of due process of law is the opportunity to be heard . . . . This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest . . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . the notice must be of such nature as reasonably to

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> convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.

Mullane, supra, at 314 (citations omitted). To date, this Court has consistently upheld this line of reasoning, requiring that prior to a final deprivation of property, interested parties must be made aware of the full range of actions which could be taken against them, so that they might anticipate and defend against those actions. In fact, this Court noted in Memphis Light, Gas and Water Civ. v. Craft, that "the purpose of notice under the Due Process Clause is to apprise the affected individuals of, and to permit adequate preparation for" an impending hearing. Memphis Light, Gas and Water Div. v. Craft, 435 U.S. 1, 14 (1978). The false notice given to the Three Lakes residents did not reach

these "content-oriented" standards of clarity and specificity.

The rule of Mullane is that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." Schroeder v. New York, 371 U.S. 208, 212, 213 (1962). Mullane, supra, at 318. Notice of the April 26, 1982 hearing by publication and posting is wholly inadequate when measured by these standards since it is readily apparent that the District had at hand the names and addresses of those persons whose property rights would be affected by the proceedings. The District apparently also believed that notice by posting at the local courthouse and by publication in the local newspaper in April

would be sufficient to alert property owners who were seasonal users of their summer resort property (as acknowledged in the very Act in question, see C.R.S. § 32-10-102) of the impending hearing. For both of these glaring "procedural" deficiencies, and for failure to comply with the content-oriented standards set out above, the notice of the April 26, 1982 meeting fails to meet the due process standards set forth in Mullane.

The Colorado courts based their decisions in reliance on Hutchinson v. City of Valdosta, 227 U.S. 303 (1913). In Hutchinson, the City of Valdosta, a small Georgia town, enacted an ordinance in 1909 "requiring persons and property owners residing upon any street along which sewer mains have been laid, within thirty days after the passage of the ordinance, to install water closets in their

houses and connect the same with the main sewer pipe . . . ." An owner who did not comply with the ordinance was "subject to a fine of not exceeding two hundred dollars or to labor on the street or public works, or to be confined in the guard house . . . ." Appellant was charged with violating the ordinance and filed a suit to restrain the proceedings against her on the grounds that, "She had no notice nor opportunity to be heard before the commencement of proceedings to force her before the recorder to answer to the charge of violating the ordinance." Hutchinson, supra, at 304, 305. This Court affirmed the dismissal of the bill for the injunction stating, "It is the commonest exercise of the police power of a State or city to provide for a system of sewers and to

compel property owners to connect therewith." Hutchinson, supra, at 308.

Hutchinson is different than the instant case. First, in Hutchinson, the appellant at least had an opportunity to contest the matter in the process by which she was charged criminally for violating the ordinance. This is a procedure that not even the petitioners have been accorded. Second, Hutchinson involved an ordinance and did not involve a taking of property without any opportunity to contest the propriety thereof. The reason an ordinance is important is that ordinances are themselves not constitutional unless enacted in accordance with certain procedural safeguards. It is for this reason that city after city throughout the United States publish ordinances, verbatim, in advance in local newspapers and read them several times

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before they can become effective. We have no similar procedure to measure the District's Connection Order since the language thereof was not known until it was issued as a fiat after the hearing held following a false notice. Lastly, in Hutchinson, no taking of property was involved and connection related to abutting landowners. In fact, there is no procedure in the Connection Order or in the Colorado statutes relating to the levying, assessment and collection of taxes which gives the petitioners the same rights the appellant in Hutchinson had in her criminal proceeding.

Consequently, unless this Court interprets C.R.S., §32-10-117(4) as requiring due process notice and hearing or unless this Court, finding that the statute does not require due process notice and hearing, finds that the Constitution of the United States

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requires due process notice and hearing, the property of these petitioners can be taken without any opportunity to question the propriety of the taking and ultimate sale of their property for taxes. This is not the law. And this is why the Court of Appeals' decision should be reversed.

The Court of Appeals further erred in finding that Brown v. City of Denver, supra, should not be relied upon. In Brown, the Colorado Supreme Court correctly said:

> The doctrine of the authorities is, that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise; at some stage of it, and before the property is taken or the charge becomes absolute

> against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise the constitutional guaranties above cited are infringed.

Brown, supra, at 311, 312.

In Brown, Denver passed a "sidewalk ordinance" to require construction and repair of sidewalks. Publication of the ordinance was notice to lot owners to construct the sidewalks within sixty days. If the sidewalks were not constructed within sixty days, there was an arrangement by which the city would construct the sidewalks and assess the charges therefor as a special assessment against the owner's property. The issues were stated as follows:

> Two principal objections are raised as to the validity of the ordinance, one being that the statute under which it was enacted is in contravention of the state constitution, it being a special law, and therefore void; the other, that the

> provisions of the ordinance are in contravention of both the state constitution and the constitution of the United States, in not affording the owners of the property to be charged with the expense of the improvements provided for, an opportunity to be heard in respect to the same before such assessments became fixed charges against their property.

Brown, supra, at 308. The Brown court concluded:

> Testing this "sidewalk ordinance" by the foregoing principles, it is found to be defective, both as to matters of notice and hearing. The only notice given to the owner of property is a notice to construct a sidewalk of a certain kind and dimensions in front of his property, within a specified time, or that the city will cause it to be constructed at his expense; and that if the cost of construction is not repaid within another specified time, the amount, with a certain penalty added, will be placed on the tax roll as a special assessment against his property, and collected in the same manner as general city taxes are collected.

Brown, supra, at 313. The only apparent difference between the sidewalk ordinance and the Connection Order of the District is that the plaintiffs in the Brown case raised their due process claims at the time of collection rather than at the time of adoption of the ordinance. This cannot be a material difference under the law where there is in both cases no "opportunity for the correction of wrongs and errors which may have been committed." Brown, supra, at 312.

For the foregoing reasons this Petition for Writ of Certorari should be granted.

Respectfully submitted,

John M. Cogswell
Attorneys for the
Plaintiffs-Appellants
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Telephone: (303) 861-2150

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of March, 1986, mailed, postage prepaid, a true and correct copy of the foregoing Petition for Writ of a Certiorari to the Colorado Court of Appeals to:

Timothy J. Beaton, Esq.
Moses, Wittemyer, Harrison
& Woodruff, P.C.
P. O. Box 1440
Boulder, CO 80306

APPENDIX

No.	Description
1	Order dated March 16, 1984 of the Grand County District Court to be reviewed with attached copy of Order of Dismissal dated January 25, 1983 in a related case which was incorporated in the March 16, 1984 Order by reference.
2	Opinion of the Colorado Court of Appeals dated August 22, 1985.
3	Three Lakes Water and Sanitation District Act, as amended. Amendments to this Act were made in 1975, 1977, 1979, 1980 and 1985 though none of these amendments is material to issues raised by this Petition and are therefore not included. Further, portions of the Act have been excluded as being unnecessary.
4	Pertinent Colorado statutes relating to taxes and enforcement of the lien accorded the District upon its making connection, in default of a landowner doing so.
5	Notice and Connection Order of the District.

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DISTRICT COURT, GRAND COUNTY,
STATE OF COLORADO

Case No. 83CV99

(Filed District Court
March 19, 1984
Grand County, Colo.)

MINUTE ORDER

Pearl Alperstein, et al.,

Plaintiff,

vs.

Three Lakes Water and
Sanitation District,

Defendant.

The Court has now reviewed the Plaintiffs' brief filed 12-2-83 and the Mennonite case referred to therein. This Court does not believe that case overruled Hutchison v. City of Valdosta, 227 U.S. 303. Having reviewed all memoranda and cases cited the Court will not enlarge this file further by entering a new order but rather will incorporate herein in every detail except the reference to the Nov. 18, 1983 minute order, the order it entered on February 3, 1984. The order of February 3, 1984 is reinstated as of this date. The parties may proceed with their appeals.

Richard P. Doucette

DISTRICT COURT
COUNTY OF GRAND 82CV105 ORDER OF DISMISSAL
STATE OF COLORADO

WESLEY W. HOYT and RUTH KEENAN f/k/a RUTH LININGER,

Plaintiffs,

vs.

THE BOARD OF DIRECTORS OF THE THREE LAKES WATER AND
SANITATION DISTRICT, a Colorado Special District,

Defendant.

DISTRICT COURT
COUNTY OF GRAND 82CV109 ORDER OF DISMISSAL
STATE OF COLORADO

BETTY A. ALLEN a/k/a BETTY A. SMART, et al.,

Plaintiffs,

vs.

THREE LAKES WATER AND SANITATION DISTRICT,

Defendants.

THIS MATTER comes regularly before this Court on certain motions hereinafter described, and the Court being fully advised in the premises enters the following findings, conclusions and orders.

PROCEDURAL BACKGROUND

A. In Case No. 82CV105 the relevant pleadings are as follows:

On August 20, 1982 the Plaintiffs filed their Complaint under Rule 106(a)(4) and their Motion for Order to Show Cause under Rule 106, C.R.C.P. in the District Court of Grand County. The Complaint asserts that the Defendant, through its board of directors, exceeded its jurisdiction and abused its discretion when it ordered the Plaintiffs to connect their inhabited premises to the Defendant's sewer lines, which are within 400 feet of the Plaintiffs' property.

An Order and Citation to Show Cause under C.R.C.P. 106(a)(4) was issued by this Court on August 26, 1982 to the Defendant requiring it to certify its record relating to Plaintiffs' property and its order requiring connection to Defendant's sewer line.

On September 27, 1982 the Defendants answered the Plaintiffs' Complaint, counterclaimed requesting an order of this Court requiring the Plaintiffs to connect to Defendant's sewer line and pay appropriate tap fees, and raising an affirmative defense of estoppal [sic]. The Defendant on that date also filed a Motion to Dismiss Plaintiffs' Complaint and to quash the Order to Show

Cause, asserting that the decision to require Plaintiffs to connect to the district's system is not a proper subject for Rule 106, C.R.C.P. review since it was not a judicial or quasi judicial decision. This motion was supported by memorandum.

On September 30, 1982 the secretary of the Defendant district certified to the Court the documents relating to a public hearing held by the Defendant on April 26, 1982. At this public hearing, generally, a resolution was adopted requiring all owners of inhabited properties within 400 feet of any of the Defendant's sewer lines to connect to said lines. It was further resolved that written notice be given to all such owners to connect within 20 days of receiving notice.

On October 6, 1982 the Defendant submitted a supplemental memorandum in support of its Motion to Quash filed September 27, 1982.

On October 12, 1982 the Plaintiffs filed their Reply denying the Defendant's Counterclaim.

On October 25, 1982 Plaintiffs filed their Motion to Consolidate Case 82CV105 with Case 82CV117 (which was properly Case 82CV109).

On October 15, 1982 Plaintiffs filed their Motion for Summary Judgment supported by a combined memorandum in opposition to the Defendant's Motion to Quash and in support of Plaintiffs' Motion for Summary Judgment.

On November 18, 1982 this Court consolidated Case No. 82CV105 into Case No. 82CV109 for purposes of discovery and motions hearings.

B. In Case No. 82CV109 the relevant pleadings are as follows:

On August 25, 1982 the Plaintiffs filed their Complaint under Rule 106, C.R.C.P. and for declaratory relief. The Complaint asserts that in entering its order requiring Plaintiffs to connect to Defendant's sewer lines, Defendant failed to find the connections were necessary for the protection of public health pursuant to 32-10-117(4), C.R.S., 1973, or if such a finding was made, it was not supported by evidence as to each of the Plaintiff's [sic] properties. It is further alleged that the order to connect was entered without notice and an opportunity to be heard given to the property owners, therefore a violation of due process, and thus making Defendant's order as to these Plaintiffs void and of no effect. The Plaintiffs also request that this Court, as part of the declaratory judgment, order that for the Defendant to compel connection to its sewer lines it must:

> (a) Hold a hearing to determine if the public health necessitates connecting to the Defendant's sewer lines, and
>
> (b) Give Plaintiffs notice and opportunity to be heard.

As a second claim, the Plaintiffs assert that they are members of a class and that the Court order requested should apply to all members of the class and that any stay entered by the Court also apply to all members of the alleged class.

On August 26, 1982 this Court entered its Order to Show Cause and Stay Proceedings.

On September 30, 1982 the Defendant filed its Answer and asserted a Counterclaim and Affirmative Defenses, generally denying Plaintiffs' Complaint, counterclaiming for an order of this Court requiring Plaintiffs to connect to the Defendant's sewer lines, payment of tap fees, asserting as an affirmative defense estoppal [sic] and laches, and finally that six the Plaintiffs have filed covenants on their property agreeing to connect to a waste water system once service became available.

On September 30, 1982 Defendant also filed its Motion to Dismiss the Rule 106, C.R.C.P. proceeding and to quash the Order to Show Cause and Stay Proceedings entered August 26, 1982 by this Court. This motion also moved to dismiss Plaintiffs' claim for class action and for summary judgment. The grounds for dismissal stated in the motion are that Defendant's actions were not judicial or quasi judicial and, therefore, this Court lacks jurisdiction under Rule 106, C.R.C.P. As to the class action issue, the Defendant alleges failure of the Plaintiffs to assert specific facts which support their class action claim. On the claim for declaratory judgment, the

Defendant asserts there is no material issue of fact, that Plaintiffs were given notice, and that summary judgment for Defendant should be entered. The motion is supported by memoranda and affidavits filed the same date.

On September 30, 1982 the secretary of the district certified to the Court the district's records relating to the approval of the resolution requiring the connection to the district's sewer lines, the record here being the same as in Case 82CV105.

On October 6, 1982 Defendant filed a supplemental memorandum to its motions of September 30, 1982.

On October 21, 1982 Plaintiffs filed their Reply to the Defendant's Counterclaim, an affirmative defense asserting various grounds why Plaintiff should not be required to connect to Defendant's system and denying the alleged estoppal [sic] or applicability of the doctrine of laches. The Reply also alleges that the covenants signed by some of the Plaintiffs may not be enforced by Defendant.

On November 8, 1982 Plaintiffs filed their Response to Defendant's motions to dismiss and for summary judgment.

On November 18, 1982 the Court granted the Plaintiffs' motion in 82CV105 to consolidate for purposes of discovery and motions hearing with 82CV109.

C. Proceedings Subsequent to Consolidation.

On November 19, 1982 Plaintiffs from 82CV109 filed their Motion for Summary Judgment on the ground that all matters of fact were of public record and there were no material issues of fact. The Plaintiffs' motion is supported by memorandum filed the same day supplementing their prior response and supporting their Motion for Summary Judgment.

On November 19, 1982 the Plaintiffs in 82CV105 amended their Reply to the Defendant's Counterclaim and generally asserted that Plaintiffs should not be ordered to connect to the Defendant's system because:

(1) They did not receive adequate notice of, nor were they given an opportunity to be heard at the hearing when the Defendants determined connection to its system was necessary to the public health on April 26, 1982.

(2) The findings regarding necessity for public health made on April 26, 1982 were not supported by evidence at the hearing and are an abuse of discretion.

(3) Defendant has incurred a five million dollar indebtedness, which indebtedness was not submitted to the electors pursuant to 32-10-128, C.R.S., 1973, and Article IX, Section 6 of the Colorado Constitution, consequently Plaintiffs cannot be compelled to connect.

(4) The Defendant has established tap fees without notice and hearing as required by 32-10-117(3), C.R.S., 1973, and the board has not made a finding that the Plaintiffs' property is within 100 feet of the service lines as required by Section 32-10-117(2).

On December 2, 1982 the Defendant filed its Response and reply brief in support of its Response to all Plaintiffs' Motions for Summary Judgment. In this Response the Defendant essentially converted all of its prior motions to dismiss to motions for summary judgment.

On December 3, 1982 the Court entered its Minute Order requesting that the parties advise regarding the motions which were at issue by January 3, 1983, and the Order set this matter for review on January 6, 1983.

On December 30, 1982 counsel for Defendant advised that there were pending three motions in Case No. 82CV105 and four motions in Case No. 82CV109.

On January 3, 1983 the Plaintiffs filed their combined Response to Defendant's Reply Brief filed December 2, 1982.

On January 5, 1983 the Plaintiffs' counsel in Case No. 82CV109 filed their advisement of pending motions listed as a fifth motion now pending in Case No. 82CV109 the Defendant's Motion to Dismiss Plaintiffs'

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Cl[illegible]lass Action filed September 30, 19[illegible] Plaintiffs also filed their Motio[illegible]ation of Issues on that date.

On January 6, 1983 the Defendant submitted its Reply to the Plaintiffs' Combined Response filed January 3, 1983 with the Court.

On January 6, 1983 the Court entered its Order terminating further pleadings pending a resolution of the motions then at issue. The Court also took all motions at issue under advisement so that it might review the pleadings in this proceeding and rule upon those motions properly at issue.

GENERAL BACKGROUND

The Three Lakes Water and Sanitation District was created by Senate Bill 317 adopted by the 48th General Assembly for the State of Colorado in 1971 (See 1971 Sessions Laws, Chapter 247, Page 1[illegible]2). This legislation was prompted, acc[illegible]ding to the legislative declaration, Sec[illegible]n 89-24-2, C.R.S., 1963, now Section 3[illegible]-10-102(1(a), C.R.S., 1983 because:

> "(a) Certain areas in this state possess natural characteristics which make them attractive for the building of seasonal homes and tourist facilities. There is an increasing need to build public facilities in such areas in order to accommodate the needs of the seasonal population. Many of these areas contain large federal land

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> holdings which attract seasonal users. The increasing public use in such areas is leading to serious water quality problems, a factor of concern to all the citizens of this state. Such an area is the three lake area of Grand county, surrounding Grand lake, Shadow Mountain lake, and lake Granby. The general assembly thus declares that the creation of this district promotes the health, comfort, convenience, safety, and welfare of all the people of the state and visitors to the state, and will be of special benefit to the inhabitants of the district and the property therein."

Subsequent to its adoption in 1971, this legislation, which is now found in Article 10, Title 32, Section 101 through 179, C.R.S., 1973, has been amended several times but never repealed.

THE DISTRICT'S ORDER OF APRIL 16, 1982

According to the record before this Court, on April 26, 1982 a public hearing was held before the Board of Directors of the District, and at the conclusion of the hearing a resolution was adopted requiring property owners within the District where an inhabitated premises was located to connect to the District's sewer line if their property boundary was within 400 feet of the District's line. Notice of the hearing was published in the local newspaper, and numerous citizens appeared in opposition to the proposed order.

The Board on that date also directed that notice be given to all such owners and that they be required to connect to the District's system within 20 days. At this hearing the Board of Directors also found that the connections were necessary for the public health (See records certified to this Court on September 30, 1982). Subsequent to this resolution, notice was sent to some or all of the Plaintiffs advising them that they would be required to connect to the Defendant's system, to make the connection and pay the fees required by the District. There is no issue, according to the pleadings, as to the material facts in this case. For a more detailed statement of the factual background, the Court notes the statements contained in pages two and three of the Defendant's memorandum filed on September 27, 1982 and September 30, 1982 in support of its motions to dismiss in both Case No. 82CV105 and Case No. 82CV109.

PENDING MOTIONS

From the memoranda of the parties and the Court's own review of Case No. 82CV105 and Case No. 82CV109, it appears there were pending on January 6, 1983 and at issue the following motions:

Case No. 82CV105:

1. Defendant's Motion to Dismiss Plaintiffs' Complaint filed September 27, 1982. (This motion pursuant to pleadings filed December 2, 1982 and the language of the motion will also be considered as a motion for summary judgment under Item No. 5 below)

2. Defendant's Motion to Quash Order to Show Cause filed September 27, 1982.

3. Plaintiffs' Motion to Consolidate Case No. 82CV105 and Case No. 82CV109 filed October 25, 1982. (This motion was partially granted earlier and will now be considered for purposes of consolidation for further proceedings, if any)

4. Plaintiffs' Motion for Summary Judgment filed November 8, 1982.

5. Defendant's Motion for Summary Judgment as filed September 27, 1982 and December 2, 1982. (See Item No. 1 above)

Case No. 82CV109:

1. Defendant's Motion to Dismiss Plaintiffs' Complaint filed September 30, 1982. (This motion pursuant to pleadings filed December 2, 1982 will also be considered as a motion for summary judgment under No. 5 below)

2. Defendant's Motion to Quash Order to Show Cause and Stay Proceedings filed September 30, 1982.

3. Defendant's Motion to Dismiss Plaintiffs' Claim for Class Action filed September 30, 1982.

4. Plaintiffs' Motion for Summary Judgment filed November 19, 1982.

5. Defendant's Motion for Summary Judgment as filed September 30, 1982 and December 2, 1982. (See Item No. 1 above)

For purposes of this Order, the Court will consider the Defendant's motions in Case No. 82CV105 and 82CV109 numbered one, two and five conjunctively, and will also consider Plaintiffs' motion number four above in the conjunctive. The third motion in each case will be dealt with separately.

I. Defendant's Motion to Dismiss Plaintiffs' Claim for Relief Under Rule 106(a)(4) is granted.

Defendant asserts that the Order of April 26, 1982 is not subject to the Rule 106 review. Section 32-10-117(4) and (5), C.R.S., 1973 provides as follows:

> "(4) The district is authorized to compel the owner of any business, dwelling, or other inhabited premises within the district to connect such premises, in accordance with the applicable plumbing code, to the water or sewer line, or to both such lines, if the board finds such connection necessary for the protection of public health, and if the service lines of the district are within four hundred feet of the nearest property line of such premises."
>
> "(5) The board shall give notice to compel such connection to such owner by registered or certified mail,

EDITOR'S NOTE

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return receipt requested, to make such connection with twenty days of receipt of such notice, and if such connection is not begun within such period and completed with reasonable diligence by the owner, the board may thereupon make such connection, and the district shall, upon completion, have a first and prior lien on the premises for the cost of such connection. Such lien shall be enforced in accordance with the provisions of section 32-10-121."

The leading case in Colorado on what is or is not subject to review under Rule 106 is Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975). At Page 374 is the following statement:

"In order to support a finding that the action of a municipal legislative body is quasi judicial, all of the following factors must exist: (1) a state or local law requiring that the body give adequate notice to the community before acting; (2) a state or local law requiring that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requiring the body to make a determination by applying the facts of a specific case to certain criteria established by law."

From a review of the criteria quoted above, it appears to this Court that none of the criteria of Snyder apply. Subsection (4) of 32-10-117, C.R.S., 1973, requires no notice, hearing, and sets no criteria against which the facts of a specific case can be considered. At the very best, the general requirement of "necessary for the protection of public health" would establish only the last of the three requirements. (Assuming arguendo this Court could find any established criteria for which is necessary for the protection of public health).

As to the requirement for notice and hearing on constitutional grounds, the Court notes that the police powers of government have been recognized as being one of the least limitable powers and notice and hearing are not required by either state or federal constitution. District of Columbia v. Brooke, 214 U.S. 138, Hutchinson v. City of Valdosta, 277 U.S. 303, and also Millis v. Board of County Commissioners of Larimer County, 626 P.2d 652. As to the necessity for the rule, the Court notes the numerous cases cited by Defendant from other jurisdictions.

This Court has reviewed Denver v. Eggert, 647 P.2d 216 (1982), and in that case the Supreme Court there first determined that the only action the board of county commissioners could have taken was either revocation or suspension of an existing certificate or the consideration of a new certificate. In either event the applicable statutes, 30-20-103 and -104 for new certificates, and 30-20-112 for suspension of a certificate required hearing, notice, and

the statutes also established certain specific criteria. The Supreme Court then went on to note that action of the commissioners in that case was quasi judicial rather than legislative, not only based on the statute but also based on some general concepts, which taken to their extreme, in this Court's opinion, would make nearly every action of a governing or legislative body quasi judicial and, therefore, subject to judicial review just as the Plaintiffs urge in this case. Such could not have been the intent of the Court in Eggert. In the present case there is no statutorily mandated notice, hearing or established criteria for the standard of necessary for the protection of public health. (See all of Title 32, Article 10). If the action of this board in compelling connection was quasi judicial, then presumably so was the state legislature's decision to enact Article 10 of Title 32, it being only a matter of degree as to the number of citizens affected.

Based on its reading of Snyder, supra and its progeny this Court concludes that the action of the Defendant was quasi legislative and not quasi judicial. Being legislative in nature, it is not subject to judicial review under Rule 106, C.R.C.P.

The Court would further note that if, in view of the Eggert decision, the action of the Defendant on April 26, 1982 should be determined to be a reviewable act, the action of the Defendant is amply supported by the record and would not be reversed by this Court. Adequate notice was given, as shown in the record, and Section 32-10-117(4), C.R.S. 1973 as interpreted by this Court, authorizes

the District to compel connection of all owners who have inhabited premises within 400 feet of the District's lines. The argument that any cannot mean all seems to this Court to be a distinction without meaning since "any" surely includes the full spectrum of none to all. Having chosen to require all owners to connect, this Court will not limit the Defendant's authority by a strained interpretation when the obvious intended purpose of Section 32-10-117(4) is clear.

II. Defendant's Motion to Quash the Order to Show Cause in 82CV105 and 109 and the Order to Stay Proceedings in 82CV109 is granted.

Having granted the Defendant's Motion to Dismiss the Rule 106 proceeding, the Court also grants the Motion to Quash.

III. Plaintiffs' Motion for Summary Judgment is granted in part and denied in part.

The Plaintiffs' Motion for Summary Judgment on the issue of the Order to Compel Connection entered April 26, 1982 is denied in view of the ruling on the Rule 106 proceeding. Said motion is granted, however, as it relates to the Defendant's request in its Counterclaims for an order of this Court compelling connection to the District's system.

Section 32-10-117(5), C.R.S., 1973, provides the sole and only remedy for the District upon failure of anyone ordered to connect who fails to do so under the

circumstances of this case. The Court make no ruling with regard to possible orders entered by a county or municipal board of health pursuant to other sections of the Colorado statutes upon findings of public health needs. The applicable section referred to in this article provides in part that "...if such connection is not begun within such period and completed with reasonable diligence by the owner, the board may thereupon make such connection, ..." This Court has no authority under any of the provisions of Article 10, Title 32 to order a property owner to connect to the Defendant's lines or pay fees. Likewise, the Court notes that the declarations required for individual sewer permits were required by county officials and, therefore, in this Court's opinion can be enforced only by the Board of County Commissioners, county health department or municipal health department, not by the Defendant.

For the above reasons, the Plaintiffs' Motions for Summary Judgment to the extent they relate to the Defendant's Counterclaims and request for affirmative relief are granted.

IV. Defendant's Motions for Summary Judgment as filed December 2, 1982 and September 26 and September 30, 1982 are granted in part and denied in part.

There appears to this Court to be no material issues of fact in this case once the ruling concerning the Rule 106 proceeding is reached. Certain Plaintiffs have requested declaratory relief in conjunction with the

obligation of the District to hold individual hearings and submit individual notice. In ruling on Item 1 above, the Court has reached conclusions contrary to the requests of Plaintiffs and, having done so, the motion of Defendants for summary judgment is granted as it relates to this request of the Plaintiffs. Defendant has requested in its Counterclaim that this Court order the Plaintiffs to connect to Defendant's system. As to that issue, Defendant's Motion for Summary Judgment is denied (See Paragraph III above).

V. Plaintiffs' Motion to Consolidate as filed in Case No. 82CV105.

Having entered the orders stated above, the Court considers the Motion to Consolidate to be moot and, therefore, will not rule on that motion.

VI. Defendant's Motion to Dismiss Class Action in Case No. 82CV109.

Having entered the orders stated above, the Court considers the Motion to Dismiss Class Action to be moot and, therefore, will not rule on that motion.

The Court has also considered other assertions of the Plaintiffs and finds them to be without merit.

Based on the foregoing, this Court enters the following Orders:

1. The Complaint in Case No. 82CV105 shall be and hereby is dismissed.

2. The Counterclaims of the Defendant in Case No. 82CV105 shall be and hereby are dismissed.

3. The Order to Show Cause in Case No. 82CV105 shall be and hereby is vacated.

4. The Complaint in 82CV109 shall be and hereby is dismissed.

5. The Counterclaims of the Defendant in Case No. 82CV109 shall be and hereby are dismissed.

6. The Order to Show Cause and Stay Proceedings in Case No. 82CV109 shall be and hereby is vacated.

7. Pursuant to Rule 54(b), C.R.C.P., this Court finds and determines that the above orders are final orders as to all claims raised by the parties to these proceedings and, therefore, enters a final judgment dismissing all claims of all parties. The parties may proceed immediately with appropriate motions for new trial and/or reconsideration as required by the Rules to preserve their right to appeal.

DATED this 25th day of January, 1983, at Steamboat Springs, Colorado.

BY THE COURT:

Richard P. Doucette, Judge

COLO COURT OF APPEALS

84CA0512

PEARL ALPERSTEIN, et al.,)
)
Plaintiffs-Appellants,)
)
v.)
)
THREE LAKES WATER AND SANITATION)
DISTRICT,)
)
Defendant-Appellee.)

Appeal from the District Court of Grand County

Honorable Richard P. Doucette, Judge

DIVISION I
Opinion by JUDGE VAN CISE JUDGMENT AFFIRMED
Pierce and Sternberg, JJ., concur

Claiming that the district court erred in dismissing their C.R.C.P. 106 (a)(4) claim and in entering summary judgment against their requests for declaratory relief incident to an order of the defendant, Three Lakes Water and

Sanitation District (the district), requiring them to connect to the district's sewer system, plaintiffs appeal. We affirm.

The 164 plaintiffs in this action are full or part-time residents in the area of Grand County surrounding Grand Lake, Shadow Mountain Lake, and Lake Granby (the Three Lakes). They own property on which are located "businesses, dwellings, and other inhabited premises." Most of them use their property as vacation homes in the summer months. They have individual systems such as septic tanks, leaching fields, and holding tanks for disposal of their sewage.

In 1971, the general assembly enacted the Three Lakes Water and Sanitation District Act (the Act), §32-10-101 et seq., C.R.S., to

address the water pollution problems in the Three Lakes area. Sections 32-10-117(4) and (5) of the Act provide:

> "(4) The district is authorized to compel the owner of any business, dwelling, or other inhabited premises within the district to connect such premises, in accordance with the applicable plumbing code, to the water or sewer line, or to both such lines, if the board finds such connection necessary for the protection of public health, and if the service lines of the district are within four hundred feet of the nearest property line of such premises."

> "(5) The board shall give notice to compel such connection to such owner by registered or certified mail, return receipt requested, to make such connection within twenty days of receipt of such notice, and if such connection is not begun within such period and completed with reasonable diligence by the owner, the board may thereupon make such connection, and the district shall, upon completion, have a first and prior lien on the premises for the cost of such connection. Such lien shall be enforced in accordance with the provisions of section 32-10-121."

In 1972 the district submitted to the Grand County commissioners for their review and approval a comprehensive master plan for construction and operation of the district's regional public sewer system. The master plan provided that the owners of all existing and future residences and businesses would be required to connect to the district's regional system as soon as local sewage connection lines were completed. Public notice of the hearing on the adoption of the master plan was given, and the commissioners approved the plan at a public hearing on March 13, 1973.

The district's public sewer system was constructed pursuant to a federal grant. After the sewer system became operational in 1982, the district's board of directors met on

April 26, 1982, to address the subject of connection of business and residential properties to the public sewer.

Notice of the meeting was provided by posting notice at the Grand County courthouse and the district's office and publishing a notice in the April 12, 1982, issue of a newspaper of general circulation in Grand County. The notice was as follows:

> "PUBLIC NOTICE IS HEREBY GIVEN, that at a special meeting to be held on April 26, 1982, at 6:00 p.m., the Three Lakes Water and Sanitation District's Board of Directors will conduct a hearing on compelling the connection of businesses, dwellings and other inhabited premises to the District's sewage treatment facilities. The District is authorized to compel the connection of inhabited premises to the District's main service lines if the District's main service lines are within 400 feet of the nearest property line of said premises. The meeting will be held at the District's office, 1111 County Road 48 (a/k/a Golf Course Road), Grand Lake, Colorado."

The district received a number of letters prior to the meeting and over 40 members of the general public attended. They were provided with handouts upon their arrival at the meeting and were informed that they would be permitted to make brief public comments regarding connection and to submit any written documentation.

Present at the meeting were the acting Grand County sanitarian and the district engineer for the Colorado Department of Health. Both the sanitarian and the district engineer recommended that, for the protection of public health, the district require the owners of all inhabited premises located on property whose nearest boundary line is within 400 feet of the district's lines to connect to such lines. At the conclusion of the meeting, the district's board of directors adopted a

resolution requiring sewer connections as recommended by the sanitarian and district engineer.

As required by §32-10-117(5) of the Act, the district then sent out certified letters dated July 28, 1982, notifying 965 owners (including 117 of the plaintiffs in this case) of the requirement to connect to the district's sewer lines. The letter stated that "You are hereby notified that you are required to commence connection to the district sewer lines within twenty days and shall complete such connection with reasonable diligence." Subsequently, all landowners were notified by certified letter dated July 14, 1983, that the district was ordering them to connect to its sewer system. In response to

this most recent letter, this action was filed with the district court on August 12, 1983, challenging the district's connection order.

Plaintiffs sought a declaratory judgment that the connection order was void, because: (1) the due process clauses of the United States and Colorado Constitutions prohibited the district from compelling any owners of property located within its boundaries to connect to its sewer lines unless the district provided the property owners with individual notice and the opportunity to present evidence at a judicial-type hearing; and (2) the statute under which the district issued its connection order required the district to make findings regarding each property owner who was compelled to connect to the sewer lines that this connection was required for the protection of the public health, and,

therefore, the district was required to provide the landowners with notice and the opportunity for hearing before it could compel connection. Plaintiffs also sought a stay of the district's enforcement order under C.R.C.P. 106(a)(4).

The district filed an answer, and then moved for dismissal of the C.R.C.P. 106(a)(4) claim, for dissolution of an order staying the district from enforcing the connection order, and for summary judgment on the declaratory judgment claims. The court granted all of these motions. This appeal followed.

I.

Section 32-10-117(4) of the Act states that the district can "compel the owner of any business, dwelling, or other inhabited premises within the district to connect such premises . . . to the . . . sewer line . . .

if the board [of the district] finds such connection necessary for the protection of public health . . ." Plaintiffs contend that the district's power is conditioned on the board's finding that "such connection" is "necessary for the protection of public health." They argue that the district cannot "find" without having a hearing, and cannot have a hearing without first providing adequate notice to each "owner." Consequently, they assert, this statute requires that the district provide each owner the opportunity for a judicial-type evidentiary hearing prior to the district being empowered to compel that owner to connect to its sewer lines.

The district contends that the Act does not require personal notice to, and an evidentiary hearing for, each owner before the

district can order connection. It points out that §32-10-117(5) of the Act requires personal notice to the owner only after the district has determined the necessity of connection.

A plain reading of §§32-10-117(4) and (5) of the Act supports the district's position. The Act's notice provision applies only after the district has determined the necessity for connection. And that procedure is similar to the connection process which governs other local governments. See, e.g., §30-20-416, C.R.S. (1977 Repl. Vol. 12) (counties); §31-35-601, C.R.S. (1977 Repl. Vol. 12) (municipalities); §32-1-1006, C.R.S. (1984 Cum. Supp.) (other water and sanitation districts). We do not view the statutory word "finds" in the context here as requiring a judicial type hearing and personal notice.

II.

Plaintiffs also contend that, if the statute does not require notice and hearing, the due process clauses of the United States and Colorado constitutions prohibit the district from compelling any owner to connect to its sewer lines unless it provides such owner with individual notice and an opportunity for a judicial type hearing. We regard Hutchinson v. City of Valdosta, 227 U.S. 303, 33 Sup. Ct. 290, 57 L.Ed. 520 (1913), and its progeny, as dispositive against plaintiffs on this issue.

In Hutchinson, the Supreme Court reviewed an ordinance passed by the City of Valdosta by which owners of homes abutting upon any street along which sewer mains had been laid were required to install toilets in their houses and to connect the same to the public sewer

lines within 30 days from the date of passage of the ordinance. The court held that this was a valid exercise of the police power and that, although the ordinance afforded no prior personal notice or opportunity to be heard, it did not deny either due process or equal protection.

The Hutchinson court stressed that the connection order was for the welfare of the city's inhabitants and that "[i]t is the commonest exercise of the police power of a state or city to provide for a system of sewers and to compel property owners to connect therewith."

Hutchinson was cited with approval in Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 66 Sup. Ct. 850, 90 L.Ed. 1096 (1946). Numerous state courts have followed its holding that personal notice and a hearing are

not required prior to ordering connection to a public sewer system. See, e.g., Nourse v. City of Russellville, 257 Ky. 525, 78 S.W.2d 761, 766 (1935); Weber City Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E.2d 153, 160 (1955); Houpt v. County of Stephenson, 63 Ill. App.3d 792, 380 N.E.2d 1060 (1978).

Plaintiffs' reliance on Brown v. City of Denver, 7 Colo. 305, 3 P. 455 (1884) is not well taken. The issue in Brown was not, as it is here, whether notice and hearing were required before the local government could act pursuant to its police power for public health and safety reasons. Rather the issue in Brown was how the city could recover its expenses from the exercise of its police power in constructing sidewalks for those owners of

lots fronting upon a public street who had not complied with the city's order to construct sidewalks.

Our supreme court expressly distinguished the Brown case in Thiele v. City & County of Denver, 135 Colo. 442, 312 P.2d 786 (1957), where the court stated that the Brown decision related to assessments and not to the exercise of the police power. The holding in Brown on charges or assessments has no application to the issues in the present case.

The trial court correctly determined that neither the federal nor state constitutions mandated personal notice and evidentiary hearings prior to ordering connection.

III.

In view of our holding that neither the statute nor due process require personal notice and an opportunity to be heard before

issuance of the connection order by the district, we do not address plaintiffs' contentions concerning the inadequacy of the notice and hearing provided or the reviewability of the district's order.

Judgment affirmed.

JUDGE PIERCE and JUDGE STERNBERG concur.

COLORADO REVISED STATUTES, TITLE 32, ARTICLE 10

Three Lakes Water and Sanitation District Act

32-10-101. Short title. This article shall be known and may be cited as the "Three Lakes Water and Sanitation District Act".

32-10-102. Legislative declaration. (1) The general assembly determines, finds and declares that:

(a) Certain areas in this state possess natural characteristics which make them attractive for the building of seasonal homes and tourist facilities. There is an increasing need to build public facilities in such areas in order to accommodate the needs of the seasonal population. Many of these areas contain large federal land holdings which attract seasonal users. The increasing public use in such areas is leading to serious water quality problems, a factor of concern to all the citizens of this state. Such an area is the three lakes area of Grand county, surrounding Grand lake, Shadow Mountain lake and lake Granby. The general assembly thus declares that the creation of this district promotes the health, comfort, convenience, safety, and welfare of all the people of the state and visitors to the state, and will be of special benefit to the inhabitants of the district and the property therein.

(b) All property to be acquired by the district under this article shall be owned, operated, administered, and maintained for and on behalf of all of the people of the district;

(c) The provision in this article for the purposes, powers, duties, privileges, immunities, rights, liabilities, and disabilities concerning the district will serve a public use;

(d) The district created by this article is a body corporate and politic, a political subdivision of the state, and a municipal corporation with the powers provided in this article;

(e) Any notice provided for in this article for any purpose is reasonably calculated to inform each person who has a legally protected interest which may be directly and adversely affected by any proceedings under this article;

(f) The necessity for this article results from the population, growth, and development in the area included by this article and from the resultant pollution of Grand lake, Shadow Mountain lake, and lake Granby;

(g) A general law cannot be made applicable to the district, and to properties, powers, duties, privileges, immunities, rights, liabilities, and disabilities pertaining thereto as provided in this

article, because of the number of atypical factors and special conditions concerning them;

(h) The powers, privileges, and rights granted in this article and the duties, immunities, liabilities, and disabilities provided in this article comply in all respects with any requirement or limitation imposed by any constitutional provision;

(i) For the accomplishment of the purposes provided in this section, the provisions of this article shall be broadly construed.

32-10-105. Boundaries of district. The area comprising the district shall consist of the lands located in Grand county, described as follows: . . .

[detailed legal description omitted]

and the above description contains 59.25 square miles, more or less, including water surface areas.

32-10-108. Oath and bond of directors. (1) Each director shall, within thirty days after his election, appear before some officer authorized to administer oaths and take an oath that he will faithfully perform the duties of his office as required by law, and will support the constitution of the United States, the constitution of the state of Colorado, and the laws made pursuant thereto. The oath may be administered by the county clerk or by the president of the board of

directors and shall be filed with the county clerk of Grand county and with the division of local government . . . .

32-10-115. General powers. (1) The board has the following powers:

. . .

(n) To adopt by resolution and to enforce regulations to accomplish the purposes of the district. Such regulations shall be compiled and kept by the secretary so as to be readily available for public inspection;

. . .

(p) To have and exercise all rights and powers necessary or incidental to or implied from the powers granted in this article.

32-10-117. Water, sanitation - charge for availability - power to compel connection.

. . .

(4) The district is authorized to compel the owner of any business, dwelling, or other inhabited premises within the district to connect such premises, in accordance with the applicable plumbing code, to the water or sewer line, or to both such lines, if the board finds such connection necessary for the protection of public health, and if the service lines of the district are within four hundred feet of the nearest property line of such premises.

(5) The board shall give notice to compel such connection to such owner by registered or certified mail, return receipt requested, to make such connection within twenty days of receipt of such notice, and if such connection is not begun within such period and completed with reasonable diligence by the owner, the board may thereupon make such connection, and the district shall, upon completion, have a first and prior lien on the premises for the cost of such connection. Such lien shall be enforced in accordance with the provisions of section 32-10-121.

32-10-121. Levy and collection of taxes.
(1) To provide for the levy and collection of taxes, the board shall determine, in each year, the amount of money necessary to be raised by taxation, taking into consideration other sources of revenue of the district, and shall fix a rate of levy, not to exceed five mills in the taxable year 1972 and ten mills in each year thereafter, which, when levied upon every dollar of valuation for assessment of taxable property within the district, and together with other revenues, will raise the amount required by the district annually to supply funds for paying expenses in developing a master plan, expenses of organization, and the costs of constructing, operating, and maintaining the facilities and equipment of the district, and promptly to pay in full, when due, all interests on and principal of bonds and other obligations of the district. In the event of accruing defaults or deficiencies, an additional levy may be made as provided in section 32-10-122.

(2) The board may apply a portion of such taxes and other revenues for the purpose of creating a reserve fund, or funds, in such amount as the board may determine, which may be used to meet the obligations of the district, for maintenance, operating expenses, depreciation, and extension of and betterment to the facilities of the district.

(3) The board, in accordance with the schedule prescribed by section 39-5-128, C.R.S., shall certify to the board of county commissioners of Grand county the rate so fixed in order that, at the time and in the manner required by law for levying taxes, such board of county commissioners shall levy such tax upon the valuation for assessment of all taxable property within the district.

(4) All taxes levied under this article, together with interest thereon and penalties for default in payment thereof, and all costs of collecting the same, shall constitute, until paid, a perpetual lien on and against the property, and such lien shall be on a parity with the tax lien of other general taxes.

(5) Property taxes provided for in this article shall be levied, assessed, collected, remitted, and accounted for in the manner provided for other general ad valorem taxes.

COLORADO REVISED STATUTES, TITLE 39, ARTICLE 1

General Provisions

39-1-111. Taxes levied by board of county commissioners. No later than November 15 in each year, except when a school district is conducting an election to increase the authorized revenue base and is making certification under the provisions of section 22-40-102(1), C.R.S., or when a county, city, town or special district is conducting an election for an increased property tax levy and is making certification under the provisions of section 39-5-128(1), the board of county commissioners in each county of the state, or such other body in the city and county of Denver as shall be authorized by law to levy taxes, shall, by an order to be entered in the record of its proceedings, levy against the valuation for assessment of all taxable property located in the county on the assessment date, and in the various towns, cities, school districts, and special districts within such county, the requisite property taxes for all purposes required by law.

(2) As soon as such levies have been made, the board of county commissioners or other body authorized by law to levy taxes shall forthwith certify all such levies to the assessor, upon forms prescribed by the administrator, and shall transmit a copy of such certification to the administrator.

(3) If the board of county commissioners or other body authorized by law to levy taxes fails to certify such levies to the assessor, it is the duty of the assessor, upon direction of the division of local government, to extend the levies of the previous year, subject to the limitations prescribed in section 29-1-301, C.R.S. 1973.

(4) If the valuation for assessment for all or any part of any body authorized to levy taxes has been divided for an urban renewal area, pursuant to section 31-25-107(9)(a), C.R.S. 1973, the board of county commissioners shall make the same levy on the portion of valuation for assessment divided under subparagraph (II) as under subparagraph (I) of said section 31-25-107(9)(a), C.R.S. 1973, for payment of taxes according to the provisions of said section, so long as said division remains in effect.

(5) If, after certification of the valuation for assessment pursuant to section 39-5-128, changes in such valuation for assessment are made by the assessor, the assessor shall notify the board of county commissioners or other body authorized by law to levy property taxes that such changes have occurred. Upon receipt of such notification, such board or body shall make adjustments in the tax levies to ensure compliance with section 29-1-301, C.R.S., if applicable and may make adjustments in order that the same amount of revenue be raised. A copy of any adjustment to tax levies shall be transmitted to the administrator and assessor. Nothing in

this subsection (5) shall be construed as conferring the authority to exceed statutorily imposed mill levy or revenue-raising limits.

39-1-113. Abatement and refund of taxes. No abatement or refund of taxes erroneously or illegally levied shall be made by the board of county commissioners unless a hearing is had thereon, at which hearing the assessor shall have the opportunity to be present. Whenever any abatement or refund is recommended by the board of county commissioners, an application therefor, reciting the amount of such abatement or refund and the grounds upon which it should be allowed, shall be submitted to the administrator for his review pursuant to section 39-2-116. If an application is approved, the board of county commissioners shall order the abatement of taxes pro rata for all levies applicable to such property, or, in the case of a refund, the board of county commissioners shall order the refund of taxes pro rata by all taxing jurisdiction receiving payment thereof. However, in no case shall an abatement or refund of taxes be made more than six years after the taxes were due.

ARTICLE 10

Collection

39-10-114. Abatement, cancellation of taxes. (1) (a) If taxes have been levied erroneously or illegally, whether due to erroneous valuation for assessment, irregularity in levying, or clerical error, the treasurer shall report the amount thereof to the board of county commissioners, who

shall proceed to abate such taxes in the manner provided by law. If such taxes have been collected by the treasurer, the board of county commissioners shall authorize refund of the same in the manner provided by law. However, in no case shall an abatement or refund of taxes be made more than six years after the taxes were due.

(b) Any taxes illegally or erroneously levied and collected, and penalty interest thereon, shall be refunded pursuant to this section, together with refund interest at the same rate as that provided for penalty interest set forth in section 39-10-104. Said refund interest shall accrue only from the date payment of taxes and penalty interest thereon was received by the treasurer.

(2) (a) Any taxes levied on personal property which are determined to be uncollectible after a period of six years after the date of their becoming delinquent may be cancelled by the board of county commissioners; except that taxes levied on any mobile home which after diligent search by the treasurer are determined to be uncollectible due to the removal of the mobile home from the county or other valid reason may be referred to the board of county commissioners for deletion from the tax rolls after a period of one year.

(b) When any real property has been stricken off to a county by virtue of a tax sale and there has been no transfer by the county of a certificate of purchase thereon, the taxes on such property may be determined to be uncollectible after a period of six

years from the date of becoming delinquent, and they may be cancelled by the board of county commissioners. Such cancellation shall not affect the rights of the county under article 11 of this title to subsequently transfer any tax sale certificate nor its right to receive a tax deed and to exercise its rights thereunder with respect to such property.

(3) The treasurer shall keep a complete record of all taxes abated, refunded, or determined to be uncollectible and cancelled by the board of county commissioners as provided in subsection (2) of this section.

PROCEEDINGS OF DISTRICT

The following is the notice of public hearing as scheduled on April 26, 1982, published by the District in a newspaper and posted at the Courthouse:

> PUBLIC NOTICE IS HEREBY GIVEN, that a special meeting to be held on April 26, 1982 at 6:00 p.m., the Three Lakes Water and Sanitation District's Board of Directors will conduct a hearing on compelling the connection of businesses, dwellings and other inhabited premises to the District's sewage treatment facilities. The District is authorized to compel the connection of inhabited premises to the District's main service lines if the District's main service lines are within 400 feet of the nearest property line of said premises. The meeting will be held at the District's office, 1111 County Road 48 (a/k/a Golf Course Road) Grand Lake, Colorado.

The following is the letter mailed to 965 residents of the District by certified mail after the District held the hearing on April 26, 1982.

THREE LAKES WATER
AND SANITATION DISTRICT
Post Office Box 899
Grand Lake, Colorado 80447

July 28, 1982

Dear Three Lakes District Property Owners:

The Board of Directors of the Three Lakes Water and Sanitation District is pleased to announce that its wastewater treatment facilities are operational. The District's sewer lines have been thoroughly tested and the wastewater treatment system is in operation. It is now possible for you to connect to the District's sewer lines.

A Colorado state statute, C.R.S. 1973 §32-10-117(4) authorizes the Three Lakes Water and Sanitation District to compel the owner of any business, dwelling, or other inhabited premises within the District to connect such premises to the sewer line, if the service lines of the District are within four hundred feet of the nearest property line of such premises. The District's employees have determined that your property line is within four hundred feet of one of the District's service lines. Note that this notice does not apply to undeveloped properties.

You are hereby notified that you are required to commence connection to the District sewer lines within twenty days and shall complete such connection with reasonable diligence.

Since you have already paid your tap fee, and if you have made arrangements to make such connection with a qualified plumber or contractor, the District will find that you have commenced connection. Evidence that you are on a plumber's or contractor's list shall be submitted to the District's office within twenty days of the receipt of this letter.

Forty-eight hours prior to connection to the sewer line, the District's office must be notified so that an inspection of the connection can be made. There is a $25 inspection fee. This fee can be paid anytime prior to the 48-hour notice of inspection in our office.

If you have any questions regarding this matter, please contact the District's office.

Sincerely,

Jeanne Garnett
District Administrator